LIBRARY
SUPREME COURT, U. S.

Office-Supreme Co
FILE
OCT 8 1
JAMES R. BROWNI

No. 342

In the

Supreme Court of the United States

OCTOBER TERM, 1959

HOWARD L. NOSTRAND AND MAX SAVELLE, *Appellants*,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, *Attorney General, State of* Washington, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

SOLIF M. RINGOLD
1201 Dexter Horton Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Attorneys for Appellants

METROPOLITAN PRESS AND WESTERN

INDEX

	Page
Argument As To First Three Points Of Motion To Dismiss	1
Argument As To Point No. 4 Of Motion to Dismiss	3
Conclusion	8

TABLE OF CASES

Adler v. Board of Education, 342 U. S. 485, 72 S. Ct. 380, 96 L. ed. 517	4
Bridges v. Wixon, 326 U. S. 135, 89 L. ed. 2103	5, 7
Garner v. Board of Public Works, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317	4
Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722, 1 L. ed. (2d) 810	6
Slochower v. Board of Education, 350 U. S. 551, 76 S. Ct. 637, 100 L. ed. 692	4
Wieman v. Updegraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. ed. 216	6, 8

In the

Supreme Court of the United States

OCTOBER TERM, 1959

HOWARD L. NOSTRAND AND MAX SAVELLE, *Appellants*,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Appellees*.

No. - - - -

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

I. ARGUMENT AS TO FIRST 3 POINTS OF MOTION TO DISMISS

Appellees' Motion to Dismiss seems to encompass one basic argument: That the questions discussed in our Statement as to Jurisdiction were not raised or expressly passed on by the Supreme Court of the State of Washington and that therefore no substantial federal question

is presented. A brief analysis of the transcript on appeal and of our brief in the State Supreme Court will demonstrate the fallacy of this contention.

The seven questions presented in the Statement as to Jurisdiction all involve constitutional issues falling within the restrictions of the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of that Constitution. Appellees in their Motion to Dismiss, admit that the complaint, referred to in our Statement as to Jurisdiction, raised the issues of the statute's violation of the First and Fourteenth Amendments and Article I, Section 10 of the United States Constitution, and that the Statement as to Jurisdiction stated that the complaint raised those issues (St. 7).

The trial court held the State statute unconstitutional in its entirety and granted an injunction against its enforcement (Tr. 34). The State Supreme Court, in order to reverse the trial court and hold the statute constitutional, necessarily had to pass on the issues raised in the complaint, to-wit, the First and Fourteenth Amendments and Article I, Section 10.

Moreover, the Certificate of Constitutional Issue of Chief Justice Weaver of the State Supreme Court states (Tr. 80-81):

> "1. In the above-entitled cause there was drawn in question the validity of a statute of the State of Washington; namely, Chapter 377 of the Laws of 1955 of the State of Washington consisting of Sections 1, 2, 3 and 4 as applied to Howard

L. Nostrand and Max Savelle, respondents herein, on the ground of its being repugnant to the Constitution of the United States, particularly Article I, Section 10, the First Amendment and Section 1 of the Fourteenth Amendment."

2. Said questions were considered and passed upon by this Court. The decision of this Court rendered on the 29th day of January, 1959 and the Court's denial of respondents' petition for rehearing on March 20, 1959 were in favor of the constitutional validity of said statute, except Section 3 thereof, which was held by this Court to be unconstitutional and void."

Both at the trial level and on appeal the arguments were solely on these constitutional issues. Perhaps because this was so obviously the case, we did not elaborate the method in which these issues were raised and passed upon other than to state that they were raised in the complaint and that thereafter the constitutional issues were the only matters in controversy at all stages of the proceeding in the trial court and the State Supreme Court. The Statement of the case sets out the entire procedural history of this action with references to the record, and that, in itself, is a statement of the manner in which the federal questions sought to be reviewed were raised.

However, since appellees invite appellants to show that the theories and arguments in the seven questions presented in the Statement as to Jurisdiction, were argued and presented to the State Supreme Court, we submit the

following references in our brief to the State Supreme Court and in the Petition for Rehearing addressed to the same court, which presented that court with the issues encompassed by the questions presented in our Statement as to Jurisdiction.

> *Question 1.* Does the oath requirement violate the Fourteenth Amendment in that it requires automatic discharge of the State employee without hearing at which he can explain or defend (a) the reason, nature or basis of his membership in the Communist Party or other subversive organization; or (b) the reason or basis of his failure or refusal to take such oath?

On page 35 of our State brief we discussed *Slochower v. Board of Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. ed. 692, and quoted from that portion of the opinion in which the court, after discussing *Adler v. Board of Education*, 342 U. S. 485, 72 S. Ct. 380, 96 L. ed. 517, and *Garner v. Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317, states:

> "But in each of these cases it was emphasized that the State must conform to the requirements of due process . . . *The summary dismissal of appellant violates due process of law.*"

Later, in the Petition for Rehearing (Tr. 41-45), we made the argument that all of the cases relied on to support the State Court's opinion were cases involving hearings to determine the fitness of an employee for employment and stated with underlined emphasis:

"There is not one case decided by the Supreme Court of the United States which holds that the State may discharge an employee solely upon refusal to subscribe to an oath that he is not a subversive person."

All of the cases cited in support to the substantiality of the First Question in our Statement as to Jurisdiction, with the exception of *Bridges v. Wixon*, 326 U. S. 135; 89 L. ed. 2103, were also cited and discussed at length in our State brief.

Question 2. Does such oath requirement violate the Fourteenth Amendment in that it legislatively penalizes a State employee without notice, charges or hearing?

This question was raised by the same portions of our State brief as are mentioned with respect to the First Question, *supra*. Additionally, in discussing whether this State statute constituted a Bill of Attainder in our brief (pages 59-67), we referred at length to the fact that this was a legislative penalty without judicial safeguards and without any adjudicatory process.

Question 3. Does such oath requirement violate Section 10, Article I, of the Constitution in that it constitutes a Bill of Attainder?—

Appellees, in their Motion to Dismiss, admit that Question Three was presented to the State Supreme Court.

Question 4. Does such oath requirement violate the Fourteenth Amendment in that it conclusively presumes that membership in the Communist Party

is by itself grounds for dismissal of a State employee?

Question 5. Does such oath requirement violate the Fourteenth Amendment in that it penalizes membership in the Communist Party rather than acts constituting a substantive evil?

At pages 38 and 39 of our State brief we discussed *Konigsberg v. State Bar of California*, 353 U. S. 252, 77 S. Ct. 722, 1 L. ed.(2d) 810, pointing out that the mere fact of past membership in the Communist Party without anything more is not an adequate basis for concluding that a person is disloyal or of bad character. On pages 33-34 of our State brief, we discussed at length *Wieman v. Updegraff*, 344 U. S. 183, 73 S. Ct. 215, 97 L. ed. 216, and quoted the following portion of this court's opinion therein:

"Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

Question 6. Does such oath requirement violate the Fourteenth Amendment to the Constitution in that it penalizes a State employee for membership in the Communist Party even in absence of his knowledge that the Communist Party has for its purpose the violent overthrow of the government?

In our State brief, pages 24-43 were devoted to a recounting of the development of the concept of scienter as a prerequisite for loyalty oaths, discussing various decisions of this court involving the problems of scienter.

Moreover, the argument presented to this court in our Statement as to Jurisdiction regarding the substantiality of the Sixth Question is an almost verbatim quotation from the first and second pages of our Petition for Rehearing (Tr. 41-42).

> *Question 7.* Does such oath requirement violate the 1st and 14th Amendments in that it abridges freedom of speech, freedom of association and assembly?

Respondents admit that the Seventh Question was presented to the Supreme Court of the State of Washington.

While the wording of these Constitutional arguments as set forth in our State brief is not identical with the wording of the questions presented in the Statement as to Jurisdiction, the concepts involved in our arguments were clearly expounded to the State Supreme Court throughout our brief and Petition for Rehearing. Of the thirteen cases cited in our Statement as to Jurisdiction in support of the substantiality of the questions presented, all but *Bridges v. Wixon, supra,* were not only cited in our State brief, but were expounded and discussed there at considerable length. If these cases *support* the substantiality of the questions presented in our Statement as to Jurisdiction, then they certainly *posed* these same issues to the State Supreme Court. The fact that the State Supreme Court did not explicitly deal with most of these questions in its Opinion, while necessarily hold-

ing adversely to the constitutional concepts set forth therein, is a powerful reason why this court should accept Jurisdiction of this appeal.

II. ARGUMENT AS TO POINT NO. 4 OF MOTION TO DISMISS

The appellees' argument No. 4 deals solely with the question of scienter and is therefore directed solely to appellants' Sixth Question in the Statement as to Jurisdiction. It does not deal with the other six Questions Presented.

The State Supreme Court does state in words that scienter is implied in every clause of the oath and the statute. But the court goes on to hold that, since it is "common knowledge" that the Communist Party is a subversive organization (Tr. 67), specific knowledge of the Communist Party's purposes and activities is universal and is therefore to be implied conclusively. It is submitted that this holding is contrary to the specific holding of this court in *Wieman v. Updegraff*, *supra*, and therefore presents a substantial Federal question, regardless of the State Supreme Court's sophistry.

CONCLUSION

Since the questions presented to this court in the Statement as to Jurisdiction were raised by the initial pleadings and comprised the only issues before the courts below, it is submitted that the Statement as to Jurisdiction conformed to the Supreme Court Rules, that all ques-

tions presented were considered and passed upon by the Supreme Court of Washington, and that each of the seven questions presented are so substantial as to require plenary consideration for their resolution.

Respectfully submitted,

SOLIE M. RINGOLD
1201 Dexter Horton Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Attorneys for Appellants